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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 586

WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION, AFL-CIO,
EMPLOYING METALLIC LATHERS ASSOCIATION OF GREATER NEW YORK AND VICINITY
EMPLOYING LATHERS ASSOCIATION OF CHICAGO
CONTRACTING PLASTERERS AND LATHERS INTERNATIONAL ASSOCIATION
Petitioners

v.

JOHN T. DUNLOP, Individually and as Impartial Chairman of the Appeals Board, etc., et al., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS SHERMAN
THOMAS X. DUNN
1200 15th Street, N.W.
Washington, D. C. 20005
Counsel for Respondents

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QUESTION PRESENTED

Respondents object to the Petitioners' statement of Questions Presented. Question No. 1, as stated by Petitioners, assumes the unsupported conclusion that Article III, Section 5 of the Plan for Settlement of Jurisdictional Disputes has been construed "as authorizing arbitrators to nullify the recognition accorded by the contracting parties to appli-

cable 'agreements and decisions of record' " (Pet. pp. 2-3). The fact is that the Court of Appeals ruled "that the signatory parties conferred jurisdiction on the Joint Board to determine whether there existed a controlling agreement or decision of record, and, if finding none, to invoke Article III, Section 5, of the Plan. Finally, we conclude that the Board acted within the scope of its authority" (Pet. App. p. 6a). Petitioners' Question No. 2 is a fanciful issue which is not involved in this case.

It is respectfully submitted that the question is whether a finding by an arbitration board (i.e., the "National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry") that the jurisdictional dispute between the United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as "Carpenters") and the Wood, Wire and Metal Lathers International Union (hereinafter referred to as "Lathers") over the installation of ceiling systems is not governed by a decision or agreement of record is, properly, the subject of judicial review under the terms of the "Plan for Settlement of Jurisdictional Disputes" which is binding on all parties, including the Lathers, and which vests power in the Joint Board to make such finding.

STATEMENT

Petitioner, Lathers, sued the Chairman and Members of the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry, the Appeals Board, the Hearings Panel and the Carpenters to set aside an arbitration decision rendered by the Hearings Panel. Employer associations intervened on both sides of the case.

The applicable documents and the chronological facts in the case are as follows:

The Lathers and the Carpenters are parties to the "Plan

for Settling Jurisdictional Disputes Nationally and Locally" by reason of their affiliation with the Building and Construction Trades Department (AFL-CIO) and, in particular, by virtue of the provisions of Article X of the Constitution of the Department which reads as follows:

> **Jurisdictional Disputes**
>
> "All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. *Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.*" (Tab. 4, pp. 28-29). (Emphasis supplied).

Article II, Section 6 of the Constitution of the Building and Construction Trades Department provides that it is an object and principle of the Department:

> "To secure the adjustment of trade and jurisdictional disputes in the building and construction trades industry along practical lines as they may arise from time to time; *and such decisions to be final and binding on all affiliated National and International Unions and their affiliated Local Unions.*" (Tab. 4, p. 5). (Emphasis supplied).

Article III, Section 5 of the Plan provides that:

> "The Joint Board may at its discretion and after conference between contesting unions, held by the Chairman of the Joint Board, refer a repetitive dispute which it finds not to be governed by a decision or agreement of record to the Impartial Umpire for mediation and the establishment of a hearings panel and a national decision." (Tab. 3, p. 8)

Article III, Section 7 of the Plan provides that:

> "The Hearings Panel shall in every instance consider all pertinent evidence and shall render a decision if possible, within ten (10) days after the conclusion of the hearings. . . . Decisions of the Hearings Panel are not appealable to the Appeals Board and shall be immediately accepted and complied with by all parties to this agreement. Any decision or interpretation by the Joint Board shall be immediately accepted and complied with by all parties subject to this agreement unless an appeal is taken to the Appeals Board. . . ." (Tab. 3, pp. 8-9)

On April 22, 1965, the Appeals Board voted to suggest to the Joint Board that Article III, Section 5 of the Plan for Settling Jurisdictional Disputes Nationally and Locally be invoked with respect to the Lathers-Carpenters jurisdictional disputes. (Tab. 2, para. 13, p. 7; Tab. 50)

On April 28, 1965, the Joint Board voted, in accordance with the recommendation of the Appeals Board, to process the issue of nailable and screwable metal studs, including floor and ceiling runners to receive drywall, in accordance with Article III, Section 5 of the Plan. The Joint Board further voted, under the terms of this section, to process the matter of ceiling systems. (Tab. 2, para. 14, p. 7; Tab. 51)

The Chairman of the National Joint Board arranged conferences between the contesting unions and assisted in bringing together committees of the two International Unions which met in the period June to October, 1965, in an effort to resolve disputes by negotiations. These negotiations reached an impasse. (Tab. 6, p. 8)

On November 23, 1965, the Joint Board reviewed and discussed at length its previous action regarding the repetitive jurisdictional disputes between the Wood, Wire and Metal Lathers International Union and the United Brotherhood of Carpenters and Joiners over installation of nailable and

screwable metal studs, including floor and ceiling runners, to receive drywall and the installation of ceiling systems.

The Joint Board explicitly found "that there is no recognized decision or agreement of record covering the items in dispute" and voted to refer both of these jurisdictional disputes to the Impartial Umpire in accordance with Article III, Section 5 of the Plan for Settling Jurisdictional Disputes Nationally and Locally. (Tab. 2, para. 16, pp. 7-8; Tab. 52)

On January 4, 1966, the National Joint Board voted to reaffirm its previous action as reflected in its letter of November 24, 1965.

On January 11, 1966, the National Joint Board considered a letter from President Maso of the Lathers and

> ". . . again reviewed its previous actions in this matter, including its action of November 23, 1965, in which it voted that no recognized decision or agreement of record governed the disputes involved.
>
> "The Joint Board voted to reaffirm its action as outline in its letters of November 24, 1965, and January 7, 1966." (Tab. 2, para. 23, p. 9; Tab. 57)

Pursuant to notice given January 27, 1966, a hearing was held by the Hearings Panel on March 4 to consider preliminary procedural questions. The Lathers made a special appearance at this hearing. On April 4, 1966, the Hearings Panel issued a unanimous decision in which it considered the contentions of the Lathers with respect to the agreement of record of 1903 and the decision of record of 1920 and also the contentions of the Carpenters with respect thereto. The Panel concluded in its opinion that "The National Joint Board in hundreds of cases since 1948 involving disputes between the Lathers and the Carpenters over the installation of ceiling systems has in every case rejected the contention advanced again here that the dispute is governed by the agreement of January 14, 1903." (Tab. 6, pp. 11-12) The

Hearings Panel interpreted the meaning of Article III, Section 5, as follows:

> "The Lathers argue that the National Joint Board should have first made an explicit ruling on the question of whether or not the cited agreement or decision of record 'exists.' There is no such requirement on the National Joint Board in Article III, Sec. 5. The decisive issue is not whether an agreement or decision 'exists,' but rather whether it governs or controls, whether it determines, the dispute. The National Joint Board has repeatedly and consistently held the agreement and decision cited by the Lathers do not govern or determine disputes between the Lathers and Carpenters on the installation of ceiling systems." (Tab. 6, p. 12)

The Hearings Panel explicitly found:

> ". . . that there was no violation of the Plan and that the action of the National Joint Board was proper at its meeting of November 23, 1965, in referring certain jurisdictional disputes to the Impartial Umpire under Article III, Section 5 of the Plan." (Tab. 6, p. 13)

On April 13, 1966, the President of the Lathers sent a letter to the Building and Construction Trades Department objecting to the Joint Board's referral of the dispute over installation of ceiling systems to the Hearings Panel. The Lathers maintained in this letter that before the Joint Board could find that an agreement of record did not govern the dispute it "must first find whether or not the agreement of record exists." The Lathers also objected to the Hearings Panel decision of April 4. (Tab. 81, Ex. 3)

The Executive Council of the Department, which has all the powers of the convention between sessions (Tab. 4, Art. VII, Section 2, p. 22), held a hearing on this subject on April 27, 1966, and ruled as follows:

> "The position of the Executive Council with respect to the contents of your [Lathers] letter of April 13, 1966, is that they do not raise a question which can be

acted upon by the Department. Presumably, any objections which you may have should be referred to the Hearings Panel, which is part of the 'Plan for National Joint Board for Settlement of Jurisdictional Disputes.'

"The above statement is made in connection with any objections which you may have in connection with the current proceedings. Any proposals for future revision of the Plan and its application to future cases would be within the province of the Joint Negotiating Committee."

The Executive Council also ruled, in connection with another jurisdictional dispute issue, that:

"Jurisdictional disputes between International Unions affiliated with the Building and Construction Trades Department do not come within the scope of Article II, Section 12 of the Constitution of the Department. They do come within the scope of Article II, Section 6 and Article X of the Constitution and of the procedures implementing such articles." (Tab. 81, Ex. 2)

No appeal was taken by the Lathers from either of these decisions of the Executive Council under Article XI, Section 1, Subsection C of the Constitution.

Pursuant to notice issued April 4, 1966, (Atachment to Tab. 6) a hearing on the issue of the installation of ceiling systems was scheduled in Washington, D. C., by the Hearings Panel for May 16 and 17, 1966. On May 12, 1966, the United States District Court denied the Lathers' petition for a preliminary injunction to restrain the Panel hearing. (Tab. 83) The appearances at the Panel hearing were as follows: Carpenters; Lathers; Gypsum Drywall Contractors International; National Acousitcal Contractors Association; and Contracting Plasterers and Lathers International Association. Briefs were received from all parties including the Lathers and the Contracting Plasterers. The Employing Lathers Association of Chicago and the Employing Plasterers Association of Chicago also submitted a brief. Ac-

cording to the Hearings Panel "This record is undoubtedly the largest compilation, by a wide margin, of briefs, statements and evidence ever presented to a jurisdictional tribunal in the building and construction industry." (Tab. 28, pp. 2-3)

On August 24, 1966, the Hearings Panel, composed of: John T. Dunlop, Professor of Economics, Harvard University, and Impartial Umpire; Peter T. Schoemann, General President, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry; Hunter P. Wharton, General President of the International Union of Operating Engineers; William E. Nauman, Chairman of the Board of the N. M. Sundt Construction Company; and Ed S. Torrence, Assistant to the President, Painting and Decorating Contractors Association of America, issued its decision on the installation of ceiling systems. The 21-page opinion reviewed the evidence in the case, and decided on the allocation of work jurisdiction between the Carpenters and the Lathers. The Lathers had once again raised at the hearings and in its brief the objection that the dispute "is not properly before the Hearings Panel." With respect to this point, the Hearings Panel ruled as follows:

> "The National Joint Board at its meeting of November 23, 1965 'found there is no recognized decision or agreement of record covering the items in dispute.' The National Joint Board is empowered under the Plan to make such a finding. A review of the full record is not persuasive that the agreement of January 14, 1903 or the decision of record of April 28, 1920 'governs' the disputes on the installation of ceiling systems. The Appeals Board has reached the same conclusion on its record as the National Joint Board: there is no recognized decision or agreement of record governing the installation of ceiling systems. The disputes have been clearly repetitive. Accordingly, there was no violation under the Plan in referring the disputes to the Impartial Umpire under Article III, Section 5." (Tab. 28, p. 17)

The decision of the Hearings Panel on the installation of ceiling systems reads as follows:

"1. The decision of this Hearings Panel is limited to the jurisdictional disputes or work assignments in controversy between lathers and carpenters involved in the installation of ceiling systems. Nothing in this decision shall affect the jurisdiction or work assignment of any other trade, such as, but not limited to, the sheet metal workers, electricians, iron workers, etc., with a claim or interest in the installation of ceiling systems. Contractors shall use this decision as a basis for making work assignments only with regard to work in the installation of ceiling systems involving carpenters and lathers.

"2. The installation of gypsum wallboard and other types of panels fastened directly to ceiling joists shall be performed by carpenters. In the event that a carrying channel is used with gypsum wallboard or other types of panels attached thereto, nothwithstanding paragraph 4(a) below, the contractor may use carpenters to install the carrying channel in areas not exceeding 300 square feet where there are no lathers on the job.

"3. The installation of light iron work in ceiling systems with gypsum, Portland cement, acoustical or other plasters sprayed-on or trowel-applied over lath or directly to structural members shall be performed by lathers.

"4. The following types of ceiling systems are included in this paragraph: Direct Hung Suspension System; Attached Concealed System without Backing Board; Furring Bar Attached System; Furring Bar Suspension System; Indirect Hung Suspension System or similar systems.

"(a) The installation of the 1½" channel or similar carrying channel and hangers in any of the above types of systems shall be performed by lathers.

"(b) The installation of all other work, including the installation of a ceiling system in its en-

tirety if no 1½" channel or other carrying channel is used, shall be performed by carpenters.

"5. This decision shall be effective on all work assignments made on construction contracts let after October 1, 1966." (Tab. 28, pp. 20-21)

On January 16, 1967, the United States District Court granted Defendants' Motions for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment. The Court observed that the Joint Board had made a formal finding in writing to the effect that there is no recognized decision or agreement of record covering the matter in dispute. It contrasted the scope of judicial review of decision of administrative agencies and arbitration boards. The Court took the view that in the case of an arbitration board the Court could examine the question of whether the board had exceeded its jurisdiction, but that in the case of an administrative agency the Court could review findings of fact on the basis of whether they were supported by substantial evidence. In view of this difference, the Court rejected Plaintiffs' position that their allegation of errors by the Joint Board in making its finding should be ruled on by the Court. The Court concluded that the Joint Board's "finding" is not subject to judicial review, and it is a finding that was within the power of the Joint Board to make." (Tab. 99, pp. 73-74)

The Court of Appeals affirmed in a per curiam decision. It reviewed the relevant and material contentions of the Petitioners and ruled as follows:

"The District Court held, in an unpublished oral ruling—and we agree—that Article III, Section 5, of the Plan confers jurisdiction on the Joint Board to make a determination whether the dispute is or is not governed by a decision or agreement of record. The Joint Board's action was explicit in this regard, since it made such a finding in writing; *id est,* that the agreement and the decision did not govern this dispute.

"In a case involving this same Plan in the context of a jurisdictional dispute, the Court of Appeals for the First Circuit[2] reiterated the language of the Supreme Court in *United Steelworkers of America* v. *Warrier and Gulf Navigation*, 363 U.S. 574, 582 (1960). The inquiry '. . . must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made.'

"Our review is in keeping with this, and we conclude that the signatory parties conferred jurisdiction on the Joint Board to determine whether there existed a controlling agreement or decision of record, and, if finding none, to invoke Article III, Section 5, of the Plan. Finally, we conclude that the Board acted within the scope of its authority."

ARGUMENT

I. The Decision Below Is Correct.

It is clear that the parties to the system for private settlement of jurisdictional disputes in the building and construction industry, including the Lathers, entrusted the making of the requisite "finding" to the Joint Board. Article III, Section 5 of the Plan provides that:

"Sec. 5. The Joint Board may at its discretion and after conference between contesting unions, held by the Chairman of the Joint Board, refer a repetitive dispute which it finds not to be governed by a decision or agreement of record to the Impartial Umpire for mediation and the establishment of a hearings panel and a national decision." (Tab. 3, p. 8)

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[2] *Sheetmetal Workers' International Union* v. *Aetna Steel Prod. Corp.*, 359 F. 2d 5 (1966). The court also noted, in discussing the jurisdiction dispute before it: 'We may observe that if such force is given to collective bargaining agreements between management and unions, no less support should be given agreements to which unions resort to resolve their jurisdictional disputes. There is no question here but that the dispute falls within the kinds of controversy envisaged.'" (Pet. App. p. 6a)

It is also clear that the Joint Board made the "finding" contemplated by Article III, Section 5 of the Plan (Tab. 2, para. 16, pp. 7-8; Tab. 2, para. 23, p. 9; Tab. 52; Tab. 57).

The applicable rule of law which governs this case has been stated in *United Steelworkers of America* v. *Warrior and Gulf Navigation*, 363 U.S. 574, 582 (1960). The judicial inquiry ". . . must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made."

Petitioners' quarrel is with the adverse finding of the Joint Board. They seek to reargue the merits of the substantive question which was decided against their various contentions by both the Joint Board and the Hearings Panel, which are highly qualified arbitration tribunals in the complex field of building and construction jurisdictional disputes. Petitioners' unilateral contentions of error in the finding do not constitute proof of usurpation of authority or infidelity to obligation.

II. There Is No Conflict With the Decision of Another Court of Appeals on the Same Matter.

Petitioners make the inverted statement that "In its failure to evaluate the grounds for and the effect of the finding against the relevant text and texture of the Plan, the decision below is in square conflict with other circuits" (Pet. p. 13) (Cf. Rule 19(b). The fact is that the decision of the Court of Appeals for the District of Columbia Circuit is not "in conflict with the decision of another court of appeals on the same matter." The only other decision by a court of appeals involving the Plan for Settling Jurisdictional Disputes in the Building and Construction Industry is *Sheet Metal Workers International Union, AFL-CIO, Local 17* v. *Aetna Steel Products Corporation, et al.*, (1 Cir.) 359 F. 2d 1 (April 20, 1966), *cert. den.* 385 U.S. 839. There is no conflict between this decision of the United

States Court of Appeals for the First Circuit and the decision of the Court below. Indeed, there is direct accord in the principles relied upon by both courts in these cases. The pertinent language of the Court of Appeals for the First Circuit is as follows:

> "Our approach . . . is based on the assumption that no longer in the building industry should jurisdictional problems be approached like common law pleadings. We prefer to base our decision on what seem to us to be a necessary respect of and tolerance for the arbitration process.
>
> "It need hardly be stated that national policy strongly favors arbitration in labor disputes. . . .
>
> "In describing the scope of judicial review the [Supreme] Court stated that 'inquiry' . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. . . .
>
> "We may observe that if such force is to be given to collective bargaining agreements between management and unions, no less support should be given agreements to which unions resort to resolve their jurisdictional disputes." (359 F. 2d at p. 5)

The decisions cited by Petitioners at page 13 of the Petition on the issue of conflict are not apposite. To illustrate—*International Association of Machinists* v. *Hayes Corporation,* (5 Cir.) 296 F. 2d 238, is a case in which the Court of Appeals reversed the District Court's refusal to order arbitration of a grievance involving an employer's action in discharging two employees pursuant to a demand made by the Government. The court, among other things, quoted from *Warrior and Gulf* the ruling that "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in

favor of coverage." (363 U.S. 574 at pp. 582-583). The Court of Appeals also referred to its own decision in *Cameron Iron Works* where it made the statement that "The merits of the controversy may not be looked to by a court for the purpose of declaring that a correct legal interpretation of the contract would not support the construction sought. This may not be done directly, nor may it be done under the guise of determining that the matter is outside the agreement to arbitrate." (*Lodge 12, District 37, International Association of Machinists* v. *Cameron Iron Works, Inc.*, 292 F. 2d 112 at 118 (5 Cir.), *cert. den.* 368 U.S. 926) Obviously, the decision of the Court of Appeals for the Fifth Circuit is not in "square" conflict with the instant decision either as a matter of holding or principle.

III. There Is No Important Question of Federal Law.

It is evident that the decision of the Court of Appeals was based on well settled principles of federal law, most of which are set forth in the so-called Trilogy. The Supreme Court is, therefore, not presented with a situation where a court of appeals "has decided an important question of federal law which has not been, but should be, settled by this Court" (Rule 19(b)). The material set forth in Paragraphs Nos. 2 and 3 of the "Reasons for Granting the Writ" in the Petition (pp. 15-16) do not state such a question.

The Plan and its arbitration tribunals (Respondents in this case) were established to reduce jurisdictional disputes in the building and construction industry. The national importance of this private machinery is indicated by the fact that the 1965 revised agreement was signed in the White House and witnessed by the President of the United States. Petitioners' effort to expand the scope of judicial review beyond its present limits would involve the many jurisdictional decisions of record and agreements in the Green Book (Petition Appendix D) in court suits. An

increased volume of litigation would tend to disrupt the orderly processes of the arbitration machinery provided by the Plan. In the instant case, for example, the District Court, although recognizing, even in the preliminary stages of the litigation, that there was not much basis to the Lathers' case, nevertheless granted a stay of the decision of the Hearings Panel which continues to this date (see Tab. 30, p. 48). The decision of the Hearings Panel, which was intended to become effective October 1, 1966, is still in a state of suspension with consequent uncertainty in the industry.

Insofar as the volume of jurisdictional strife is concerned, it should be noted that the national decision of the Hearings Panel would dispose of a repetitive dispute which involved more than 800 job decisions by the National Joint Board during the years 1956 to 1965 (Tab. 6, p. 7). "The fact is widely known that jurisdictional disputes between the Lathers and Carpenters on the installation of ceiling systems have involved more job decisions rendered by the National Joint Board over the years since 1948 than any other issue by a wide margin" *(Decision of Hearings Panel, Ibid.)*.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari fails to make an adequate showing under Rule 19 and should be denied.

Respectfully submitted,

LOUIS SHERMAN
THOMAS X. DUNN
1200 15th Street, N.W.
Washington, D. C. 20005
Counsel for Respondents

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